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No. 73-1742

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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1. Respondents' attack on EPA's interpretation of the Clean Air Act — permitting treatment of variances from state requirements as revisions of state implementation plans if they will not interfere with timely attainment of national air quality standards — rests upon a confusing characterization of the actions of EPA and the states concerning variances and compliance schedules. The Act provides that EPA shall approve a state implementation plan if it includes, *inter alia*, schedules and timetables for compliance with emission limitations contained in the plan. 42 U.S.C. 1857c-5(a)(2)(B). Given the substantial and often unprecedented obligations imposed by the Act and EPA's implementing regulations, many states were unable, during the nine-month period available for adoption of state plans, to develop fully the compliance schedules

that would be needed to implement those plans. As a result, during the period following adoption of state plans and their approval by EPA, many states have developed compliance schedules — either individually negotiated or covering categories of sources. Where state emissions limitations or other requirements are already in effect, such schedules typically must be approved as variances under state law.

The primary question presented in this case is whether EPA may approve such variances and compliance schedules as "revisions" of the already-approved state plan in accordance with Section 110(a)(3) of the Act, or whether it must treat them as "postponements" subject to Section 110(f). Had the states been able to complete the development of compliance schedules within the nine-month period, such schedules, even if involving variances from state law requirements, would, of course, have been subject to approval as elements of the plan itself under Section 110 (a)(2), rather than as postponements.

Since most of the variances in question involve initial approval of compliance schedules, it is inaccurate to suggest that EPA seeks authority here only to treat as "revisions" extensions of previously-approved compliance schedules beyond expiration dates previously agreed to or otherwise established (Resp. Br. 48-49).[1]

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[1]Nor would a post-attainment date variance necessarily involve "an attempt to extend a compliance schedule beyond its original expiration date" (Resp. Br. 49). As the First, Second and Eighth Circuits have recognized, some authority to approve variances in the post-attainment period without resort to Section 110(f) should be recognized to accommodate such matters as "mechanical breakdowns and acts of God." *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F.2d 875, 886 (C.A. 1); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F.2d 690, 693-694 (C.A. 8); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F.2d 519, 523 (C.A. 2).

Respondents suggest that EPA could deal with compliance schedules submitted after EPA's approval of state plans "with a stroke of the pen," by disapproving all such state-submitted schedules, most of which EPA has now approved as revisions, and by promulgating "a generic regulation converting *en mass* the variance-compliance schedules it has already approved into federal compliance schedules" (Resp. Br. 49). Respondents presumably refer to EPA's authority to promulgate state implementation plans or portions thereof pursuant to Section 110(c) of the Act. 42 U.S.C. 1857c-5(c).

EPA's authority under Section 110(c), however, would appear to be no greater than the authority of the states themselves under Section 110(a), concerning the adoption of plans and revisions thereof. If, as respondents now contend, compliance schedules may only be treated as postponements under Section 110(f), it is doubtful whether EPA could treat them as federal revisions under Section 110(c). In any event, such an approach would be fundamentally inconsistent with the policies of state responsibility and federal-state cooperation that underlie the Act. 42 U.S.C. 1857(a)(3).

2. Respondents assert that EPA's interpretation of the Act is inconsistent with EPA's criticism, in other contexts, of attempts to relate emissions from particular sources to air quality measurements (Resp. Br. 31-32). The quoted comment, however, was directed to the substantially different problem of determining how to regulate *future* sources of pollution, particularly in open Western areas, pursuant to a separate program under the Act to prevent degradation of air quality in areas already meeting national standards.

As a matter of technology, because of the possibility of calibration and the availability of baseline data, one may, however, accurately determine the effect of an existing source of pollution in an area with known air quality. Indeed, that type of analysis lay at the heart of the states' development, and EPA's approval, of implementation plans. Cf. 40 C.F.R. 51.12, *et seq.* Congress recognized EPA's ability to make such assessments in Section 4 of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 256 (relied upon by respondents (Resp. Br. 27, n. 37)), which amended Section 110(a)(3) of the Clean Air Act so as to require EPA to study all state plans and determine whether their emission standards relating to fuel-burning stationary sources or suppliers of fuel to such sources "can be revised * * * without interfering with the attainment and maintenance of any national ambient air quality standard * * *."

3. We have contended that EPA's original interpretation of the Act was intended to encourage states to make their limitations requirements effective earlier than mid-1975 or to adopt more rigorous standards than needed to assure timely attainment and maintenance of national standards (Pet. Br. 11, 29-30, 41). Respondents suggest that this premise was unsound because only three states established early dates for attainment of national standards (Resp. Br. 46).

In the first place, the reasonableness of EPA's interpretation would not be refuted even if it had been less effective in achieving this result than had been anticipated. In any event, respondents' reference to three states fails to distinguish between the deadline adopted by a state for attainment of national standards, and the deadline established for compliance with its emission limitations. It is true that most states where air quality exceeded national standards in 1972 established their attainment dates at the

end of the allowable three-year period.[2] In most of those same states, however, emissions limitations were made effective immediately or at dates long before the attainment date. These limitations are the crucial means to achieve timely attainment of national standards, and EPA's purpose of encouraging such immediately effective requirements, subject to necessary variances, was well-served.

4. Respondents repeatedly assert that EPA is urging upon this Court an interpretation of the Act that it has abandoned in its own regulations (*e.g.,* Resp. Br. 16-17, 30-33). In fact, EPA has never receded from its original position that Section 110(f) is not the exclusive procedure for approval of variances from state law requirements and that such variances may be treated as revisions under Section 110(a)(3).[3] All that has happened is that EPA, as a matter of policy, chose not to persist in applying its original interpretation to the post-attainment period after EPA's position concerning that period had been rejected by four courts of appeals. As indicated in our opening brief, however, we still believe that EPA's original interpretation was reasonable and should have been sustained. While that interpretation is logically applicable to the post-attainment period as well as the pre-attainment period, only the latter is covered by the question presented in the petition. If this Court reverses the court of appeals' resolution of that question, the effect of

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[2]In view of EPA's unchallenged approvals of those attainment dates it must be assumed that earlier attainment dates were not "practicable" in those states. 42 U.S.C. 1857c-5(a)(2)(A)(i).

[3]In revising its regulations, EPA reiterated its view "that compliance date deferrals which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision * * *." 39 Fed. Reg. 34572.

the decision on EPA's authority in the post-attainment period will depend upon whether the Court follows the approach of the First Circuit, the Ninth Circuit, or EPA's original interpretation of its "revision" authority. While EPA favors the First Circuit's approach over that of the Fifth Circuit in the instant case, it would also favor its original approach or that of the Ninth Circuit over the decisions of either the First Circuit or the Fifth Circuit.

5. Respondents suggest that reversal of the court of appeals' decision will result in substantial adverse effects on the health of persons because some sources of air pollution will consequently be permitted to operate, rather than be required to shut down. This contention ignores the fact that the interpretation of the Clean Air Act we urge would permit a state to revise its implementation plan by granting a variance, subject to the approval of EPA, only if the variance would not interfere with the state's attainment or maintenance of primary air quality standards. By definition, those standards have been set by EPA at levels that, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 1857 c-4(b)(1). The Act provides a judicial remedy for those who think the standards adopted inadequate (42 U.S.C. 1857h-5(b)(1)),[4] and the present case, therefore, should

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[4]See *e.g., Kennecott Copper Corp.* v. *Environmental Protection Agency,* 462 F.2d 846 (C.A.D.C.). EPA may also be asked to exercise its authority to revise previously promulgated national standards. Cf. 42 U.S.C. 1857c-5.

be decided on the presumption that the states and EPA will adequately protect the public health by insisting that variances do not interfere with attainment or maintenance of those standards.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.